

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Kevin H. Irelan,	)	
	)	No. CV-06-00007-MWL
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
JO ANNE B. BARNHART,	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

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BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on October 2, 2006. (Ct. Rec. 13, 15). Plaintiff Kevin H. Irelan ("Plaintiff") filed a reply on October 2, 2006. (Ct. Rec. 18). Attorney Kathleen G. Kilcullen represents Plaintiff; Special Assistant United States Attorney Richard Morris represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 15) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13).

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**JURISDICTION**

On October 28, 2002, Plaintiff filed applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"), alleging disability since October 25, 2002, due to post traumatic stress disorder ("PTSD"). (Administrative Record ("AR") 83). The applications were denied initially and on reconsideration.

On December 7, 2004, Plaintiff appeared before Administrative Law Judge ("ALJ") Mary B. Reed, at which time testimony was taken from Plaintiff, medical expert R. Thomas McKnight, Ph.D., and vocational expert William Weiss. (AR 312-380). On April 29, 2005, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 14-29). The Appeals Council denied a request for review on December 5, 2005. (AR 5-7). Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g). (Ct. Rec. 1).

**STATEMENT OF FACTS**

The facts have been presented in the administrative hearing transcript, the ALJ's decision, the briefs of both Plaintiff and the Commissioner and will only be summarized here. Plaintiff was 56 years old on the date of the decision. (AR 351, 15).

At the administrative hearing held on December 7, 2004, plaintiff testified that the last time he used alcohol was August 2004. (AR 316). However, plaintiff also testified that he occasionally has a beer. (AR 359). Plaintiff testified that before April 2002 he smoked marijuana two to three times a week,

1 but later admitted he feels he can smoke marijuana if he wants to.  
2 (AR 319; 360).

3 Plaintiff testified that he had a high school education and  
4 two and a half semesters of college. (AR 351). He testified that  
5 he enlisted in the Army in 1966 where he served for three years,  
6 including one year in Viet Nam from March of 1967 until March  
7 1968. (AR 351-352). Plaintiff stated that he last worked in  
8 October 2002. (AR 352). He left work at noon that day because he  
9 "got stressed to the point where [he] was physically ill and [he]  
10 just simply could not stay there any longer without probably  
11 hurting someone." (AR 352-353). Plaintiff has worked as a  
12 forklift operator, gutter installer, sand blaster, and care  
13 provider for his father. (AR 364-367). Plaintiff reported that he  
14 left his last job because he got tired of being physically sick at  
15 work every single day. His stomach was tied in knots, his blood  
16 pressure was "through the roof" and he physically couldn't handle  
17 it anymore. (AR 354).

18 Plaintiff testified that he takes medication to help him  
19 sleep but even with medication he sleeps maybe two to three hours  
20 a night. (AR 360-361). He stated that he has had problems with  
21 his hearing (tinnitus) since he was in the Army, and with carpal  
22 tunnel syndrome in both wrists for which he wear braces at night.  
23 (AR 370-371). His knees are "shot" and he has constant back pain.  
24 (AR 372). Plaintiff reported memory problems in that his wife  
25 needs to make a list of the things he needs to do. (AR 358).  
26 Plaintiff indicated that he feels "constantly kind of anxious" and  
27 kind of numb. (AR 358-359). He reported hating to be around  
28 people, daily recurrent memories, "blowing up" when something goes

1 wrong, and being disturbed by loud noises. (AR 355-356). Plaintiff  
2 stated that he has ongoing problems with being awakened by panic  
3 attacks. (AR 361).

4 Plaintiff reported that he could not relax enough to read. He  
5 generally leaves the house once a week to attend his support group  
6 but occasionally runs errands such as going to the lumber store.  
7 He watches television. (AR 362; 357-58).

8 Medical expert R. Thomas McKnight, Ph.D., and vocational  
9 expert William Weiss testified at the administrative hearing held  
10 on December 7, 2004. (AR 320-351; 373-379).

#### 11 SEQUENTIAL EVALUATION PROCESS

12 The Social Security Act (the "Act") defines "disability" as  
13 the "inability to engage in any substantial gainful activity by  
14 reason of any medically determinable physical or mental impairment  
15 which can be expected to result in death or which has lasted or  
16 can be expected to last for a continuous period of not less than  
17 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
18 Act also provides that a Plaintiff shall be determined to be under  
19 a disability only if his impairments are of such severity that  
20 Plaintiff is not only unable to do his previous work but cannot,  
21 considering Plaintiff's age, education and work experiences,  
22 engage in any other substantial gainful work which exists in the  
23 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
24 Thus, the definition of disability consists of both medical and  
25 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
26 (9<sup>th</sup> Cir. 2001).

27 The Commissioner has established a five-step sequential  
28 evaluation process for determining whether a person is disabled.

1 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is  
2 engaged in substantial gainful activities. If he is, benefits are  
3 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If he  
4 is not, the decision maker proceeds to step two, which determines  
5 whether Plaintiff has a medically severe impairment or combination  
6 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
7 416.920(a)(4)(ii).

8 If Plaintiff does not have a severe impairment or combination  
9 of impairments, the disability claim is denied. If the impairment  
10 is severe, the evaluation proceeds to the third step, which  
11 compares Plaintiff's impairment with a number of listed  
12 impairments acknowledged by the Commissioner to be so severe as to  
13 preclude substantial gainful activity. 20 C.F.R. §§  
14 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
15 App. 1. If the impairment meets or equals one of the listed  
16 impairments, Plaintiff is conclusively presumed to be disabled.  
17 If the impairment is not one conclusively presumed to be  
18 disabling, the evaluation proceeds to the fourth step, which  
19 determines whether the impairment prevents Plaintiff from  
20 performing work he has performed in the past. If Plaintiff is  
21 able to perform his previous work, he is not disabled. 20 C.F.R.  
22 §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step,  
23 Plaintiff's residual functional capacity ("RFC") assessment is  
24 considered. If Plaintiff cannot perform this work, the fifth and  
25 final step in the process determines whether Plaintiff is able to  
26 perform other work in the national economy in view of his residual  
27 functional capacity and his age, education and past work  
28 experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);

1 *Bowen v. Yuckert*, 482 U.S. 137 (1987).

2 The initial burden of proof rests upon Plaintiff to establish  
3 a *prima facie* case of entitlement to disability benefits.

4 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
5 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
6 met once Plaintiff establishes that a physical or mental  
7 impairment prevents him from engaging in his previous occupation.  
8 The burden then shifts, at step five, to the Commissioner to show  
9 that (1) Plaintiff can perform other substantial gainful activity  
10 and (2) a "significant number of jobs exist in the national  
11 economy" which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d  
12 1496, 1498 (9<sup>th</sup> Cir. 1984).

13 **STANDARD OF REVIEW**

14 Congress has provided a limited scope of judicial review of a  
15 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
16 the Commissioner's decision, made through an ALJ, when the  
17 determination is not based on legal error and is supported by  
18 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995  
19 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
20 1999). "The [Commissioner's] determination that a plaintiff is  
21 not disabled will be upheld if the findings of fact are supported  
22 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
23 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
24 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
25 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
26 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
27 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
28 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such

1 evidence as a reasonable mind might accept as adequate to support  
2 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
3 (citations omitted). "[S]uch inferences and conclusions as the  
4 [Commissioner] may reasonably draw from the evidence" will also be  
5 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
6 On review, the Court considers the record as a whole, not just the  
7 evidence supporting the decision of the Commissioner. *Weetman v.*  
8 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
9 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

10 It is the role of the trier of fact, not this Court, to  
11 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
12 evidence supports more than one rational interpretation, the Court  
13 may not substitute its judgment for that of the Commissioner.  
14 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
15 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
16 substantial evidence will still be set aside if the proper legal  
17 standards were not applied in weighing the evidence and making the  
18 decision. *Browner v. Secretary of Health and Human Services*, 839  
19 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
20 evidence to support the administrative findings, or if there is  
21 conflicting evidence that will support a finding of either  
22 disability or nondisability, the finding of the Commissioner is  
23 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
24 1987).

#### 25 ALJ'S FINDINGS

26 The ALJ found at step one that Plaintiff has not engaged in  
27 substantial gainful activity since the alleged onset date, October  
28 25, 2002. (AR 15, 28). At step two, the ALJ determined that

1 Plaintiff suffers from the severe impairments of degenerative  
2 joint and disc disease; depressive disorder, not otherwise  
3 specified (NOS) related to alcohol abuse; posttraumatic stress  
4 disorder (PTSD); and polysubstance abuse. (AR 28). The ALJ found  
5 that when the effects of substance abuse were included,  
6 plaintiff's impairments met three of the Listings for mental  
7 impairments: 12.04 (Affective Disorders), 12.06 (Anxiety Related  
8 Disorders), and 12.09 (Substance Addiction Disorders). (AR 28).  
9 The ALJ found plaintiff's polysubstance abuse material to finding  
10 disability, and found that when using alcohol and/or drugs,  
11 plaintiff would be precluded from competitive employment. (AR 28).  
12 The ALJ determined that absent polysubstance abuse, plaintiff does  
13 not have an impairment or combination of impairments listed in or  
14 medically equal to one of the listed impairments. (AR 29).

15 The ALJ concluded that plaintiff has the RFC to perform work  
16 at all levels of exertion but with no more than occasional  
17 kneeling, crawling, crouching and stooping. (AR 29). The ALJ  
18 found that absent substance abuse, plaintiff is slightly to  
19 moderately limited in accepting instructions and responding  
20 appropriately to supervisors. (AR 27). He is slightly limited in  
21 the areas of memory and understanding, sustained concentration and  
22 persistence, social interaction and adaptation to work  
23 environments. (AR 27). At step four of the sequential evaluation  
24 process, the ALJ found that with this RFC, the plaintiff is able  
25 to perform his past relevant as a forklift operator. (AR 28, 29).  
26 Because the ALJ determined at step four of the sequential  
27 evaluation process that Plaintiff was not disabled within the  
28 meaning of the Social Security Act, she was not required to



1 proceed to step five. (AR 29).

2 **ISSUES**

3 Plaintiff contends that the Commissioner erred as a matter of  
4 law. Specifically, he argues that:

5 1. The ALJ erred by finding that substance abuse is material  
6 to determining plaintiff's disability;

7 2. The ALJ erred by failing to properly credit the VA's  
8 disability determination;

9 3. The ALJ erred by rejecting the opinions of treating  
10 physicians in favor of the opinion of the testifying medical  
11 expert, and in finding plaintiff less than fully credible; and

12 4. The ALJ erred by failing to order additional  
13 psychological testing.

14 (Ct. Rec. 13, pp. 14-16, 21-25).

15 This court must uphold the Commissioner's determination that  
16 plaintiff is not disabled if the Commissioner applied the proper  
17 legal standards and there is substantial evidence in the record as  
18 a whole to support the decision.

19 **DISCUSSION**

20 **A. Effects of Drug and Alcohol Abuse**

21 Plaintiff contends that the ALJ erred by placing too much  
22 weight on the effects of substance abuse on his limitations,  
23 particularly in view of his diagnosis of PTSD. (Ct. Rec. 13, pp.  
24 14-17). The Commissioner responds that the ALJ properly determined  
25 that benefits are barred when a claimant is unable to work due to  
26 a medically determinable impairment and drug addiction and/or  
27 alcoholism is a contributing factor material to determining  
28 disability. (Ct. Rec. 16, pp. 8-14).

1 The ALJ found that the record reflects that plaintiff suffers  
2 from the severe impairments of degenerative joint and disc  
3 disease, depressive disorder not otherwise specified ("NOS")  
4 related to alcohol abuse, posttraumatic stress disorder ("PTSD"),  
5 and polysubstance abuse. (AR 28). (The ALJ's findings with respect  
6 to joint and disc disease are not challenged). The ALJ determined  
7 that plaintiff's mental impairments, absent drug and alcohol  
8 abuse, result in only slight limitations in the ability to  
9 understand and remember, to sustain concentration and persistence,  
10 to interact socially and to adapt to work environments. (AR 27).  
11 The ALJ determined that plaintiff, absent drug and alcohol abuse,  
12 is slightly to moderately limited in the ability to accept  
13 instructions and to respond appropriately to criticism from  
14 supervisors. *Id.*

15 The Social Security Act bars payment of benefits when drug  
16 addiction and/or alcoholism ("DAA") is a contributing factor  
17 material to a disability claim. 42 U.S.C. §§ 423 (d) (2) (C) and  
18 1382 (a)(3)(J); *Sousa v. Callahan*, 143 F. 3d 1240, 1245 (9<sup>th</sup> Cir.  
19 1998). "Material" means that the individual would not be found  
20 disabled if he stopped using drugs and/or alcohol. Contrary to  
21 his assertion, Plaintiff has the burden of showing that his DAA is  
22 not a contributing factor to disability. *Ball v. Massanari*, 254  
23 F. 3d 817, 823 (9<sup>th</sup> Cir. 2001). If there is evidence of DAA and  
24 the individual succeeds in proving he is disabled, the  
25 Commissioner must determine whether the DAA is material to the  
26 determination of disability. 20 C.F.R. §§ 404.1535 and 416.935. If  
27 an ALJ finds that the claimant is not disabled, then the claimant  
28 is not entitled to benefits and there is no need to proceed with

1 the analysis to determine whether alcoholism is a contributing  
2 factor material to disability. However, if the ALJ finds that the  
3 claimant is disabled and there is medical evidence of drug  
4 addiction or alcoholism, then the ALJ must proceed to determine if  
5 the claimant would be disabled if he stopped using alcohol or  
6 drugs. *Bustamante v. Massanari*, 262 F. 3d 949 (9<sup>th</sup> Cir. 2001).

7 In this case, the ALJ evaluated the evidence of record,  
8 considered the hearing testimony of plaintiff and the expert  
9 witnesses and concluded plaintiff is disabled when the effects of  
10 ongoing DAA are considered, but when plaintiff's limitations  
11 absent DAA are considered, he has the residual functional capacity  
12 to perform past relevant work. (AR 22, 27-28).

13 Based on the substantial weight of the record, the ALJ  
14 determined that plaintiff would not be disabled if he stopped  
15 using alcohol or drugs. (AR 25, 29). In reaching this conclusion,  
16 the ALJ relied on plaintiff's statement to the VA following his  
17 hospitalization in April of 2003 that "he felt he was managing his  
18 symptoms more effectively and found peer support and remaining  
19 active to be especially helpful." (AR 18, 25). The ALJ observed  
20 that plaintiff's discharge report indicates he was in good spirits  
21 and in stable condition. (AR 19). The ALJ relied on the fact that  
22 during his hospitalization plaintiff was noted to be alert with no  
23 cognitive deficits and was able to interact well with staff and  
24 other patients. (AR 18, 25). The ALJ noted that during  
25 plaintiff's hospitalization he was not ingesting alcohol or  
26 smoking marijuana, whereas when he is drinking he has greater  
27 cognitive and social difficulties. (AR 25). The ALJ considered  
28 Dr. Rowe's opinion that plaintiff's substance abuse contributed to

1 his symptoms of depression. (AR 21). The ALJ relied on the  
2 opinion of the testifying medical expert, Dr. McKnight, who  
3 reviewed all of the records and opined that plaintiff's substance  
4 abuse materially contributed to his finding of disability and that  
5 if plaintiff stopped abusing substances he would be able to work  
6 because his mental limitations were only slight to moderate. (AR  
7 22-23, 27). Dr. McKnight's opinion is consistent with other  
8 competent evidence in the record.

9 Plaintiff's voluminous attachments outlining the frequency  
10 with which PTSD sufferers also abuse substances does not change  
11 the analysis. The ALJ was required to determine whether plaintiff  
12 has severe limitations if he does not abuse substances; the fact  
13 large numbers of people suffer from both PTSD and substance abuse  
14 is not probative to the legal issues before the ALJ. The ALJ did  
15 not err in relying on Dr. McKnight's opinion, on plaintiff's  
16 hospital records, and on the opinion of Dr. Rowe in making her  
17 determination that if plaintiff stopped using alcohol and  
18 marijuana he would not be disabled.

19 **B. VA Disability Determination**

20 Plaintiff contends that the ALJ erred by failing to properly  
21 consider the VA's 70% disability determination. (Ct. Rec. 13, pp.  
22 18-19). The Commissioner responds that, while the ALJ must  
23 ordinarily give great weight to the VA rating, the VA and SSA  
24 criteria are not identical, and the ALJ may give less weight to  
25 the VA rating if he gives persuasive, specific valid reason that  
26 are supported by the record. (Ct. Rec. 16, pp. 15-16), *citing*  
27 *McCartey v. Massanari*, 298 F. 3d 1072, 1076 (9<sup>th</sup> Cir. 2002).

28 The ALJ is not required to give great weight to a VA rating

1 if the decision adequately explains the valid reasons for not  
2 doing so. *Id.* In this case the ALJ observed that the VA's 70%  
3 disability determination took into account plaintiff's drug and  
4 alcohol addiction. (AR 21, 25). The ALJ reached this conclusion  
5 because VA physician Dr. Hohenegger's diagnosis includes  
6 alcohol/cannabis abuse. (AR 24). The ALJ agreed with the VA's  
7 assessment that plaintiff is disabled when abusing substances. (AR  
8 25). The ALJ recognized, however, that the SSA regulations  
9 (unlike the those of the VA) require her to consider plaintiff's  
10 limitations absent his substance abuse. (AR 24). While plaintiff  
11 was hospitalized and substance free, the ALJ noted that he was  
12 reported to be alert with no cognitive deficits and able to  
13 interact well with staff and other patients. (AR 25). The ALJ's  
14 duty to consider the effects of alcohol and drug abuse when  
15 determining disability and plaintiff's apparently mild limitations  
16 when substance free adequately explain the ALJ's valid reasons for  
17 giving little weight to the VA's disability determination. See  
18 *McCartey v. Massanari*, 298 F. 3d at 1076 (9<sup>th</sup> Cir. 2002).

19 **C. Medical Professional Opinions and Credibility**

20 Plaintiff contends that the ALJ erred by giving greater  
21 weight to the opinion of R. Thomas McKnight, Ph.D., than to the  
22 opinions of J. Wayne Ball, MSW, LCSW and Miles Hohenegger, Ph.D.  
23 (Ct. Rec. 13, pp. 18-20, 23-24). The Commissioner responds that,  
24 the ALJ properly relied on the testimony of the medical expert and  
25 the opinion of Dr. Rowe that plaintiff's alcohol abuse contributed  
26 significantly to his ongoing depressive symptoms. (Ct. Rec. 16,  
27 pp. 16-18).

28 In a disability proceeding, the courts distinguish among the

1 opinions of three types of physicians: treating physicians,  
2 physicians who examine but do not treat the claimant (examining  
3 physicians) and those who neither examine nor treat the claimant  
4 (nonexamining physicians). *Lester v. Chater*, 81 F.3d 821, 839  
5 (9<sup>th</sup> Cir. 1996). A treating physician's opinion is given special  
6 weight because of his familiarity with Plaintiff and Plaintiff's  
7 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir.  
8 1989). Thus, more weight is given to a treating physician than an  
9 examining physician. *Lester*, 81 F.3d at 830. However, the  
10 treating physician's opinion is not "necessarily conclusive as to  
11 either a physical condition or the ultimate issue of disability."  
12 *Magallanes v. Bowen*, 881 F.2d 7474, 751 (9<sup>th</sup> Cir. 1989) (citations  
13 omitted). To reject the treating physician's opinion, the ALJ  
14 must state specific, legitimate reasons that are supported by  
15 substantial evidence. *Flaten v. Secretary of Health and Human*  
16 *Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995); *Fair*, 885 F.2d at 605.  
17 Historically, the courts of the Ninth Circuit have recognized  
18 conflicting medical evidence, the absence of regular medical  
19 treatment during the alleged period of disability, and the lack of  
20 medical support for doctors' reports that are based substantially  
21 on Plaintiff's subjective complaints of pain, as specific  
22 legitimate reasons for disregarding the treating physician's  
23 opinion. *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604.

24 J. Wayne Ball, MSW, LCSW, of the VA believed that plaintiff  
25 could not maintain competitive employment. (AR 290-292). Plaintiff  
26 asks this court to accord to Mr. Ball the status of a treating  
27 physician. (Ct. Rec. 13, pp. 23-24). The Commissioner counters  
28 that, as a social worker, Mr. Ball is not an acceptable medical

1 source who can provide evidence to establish impairment; rather,  
2 his statements are competent lay evidence that the ALJ must take  
3 into account. (Ct. Rec. 16 at 16).

4 While Mr. Ball opined that plaintiff suffers from depression  
5 and "rather severe PTSD" (AR 290), he is neither a physician nor a  
6 licensed or certified psychologist. Therefore, the social  
7 worker's opinions do not qualify as "medical evidence . . . from  
8 an acceptable medical source" as required by the Social Security  
9 regulations. 20 C.F.R. §§ 404.1513, 416.913. Moreover, as noted  
10 by the ALJ, Mr. Ball's report is based on plaintiff's self report  
11 and contains nothing that is based on his observations or testing.  
12 (AR 21). Although the ALJ did not reach the same conclusion as Mr.  
13 Ball with respect to plaintiff's employability, she similarly  
14 found that he suffered from both depression (NOS) and PTSD. In  
15 addition, the ALJ found that plaintiff's depression was related to  
16 alcohol abuse and he suffers from polysubstance abuse. (AR 28).  
17 The ALJ notes that Mr. Ball did not consider plaintiff's  
18 limitations without using drugs or alcohol. (AR 24).

19 Miles Hohenegger, Ph.D., completed a psychological evaluation  
20 of plaintiff on April 6, 2004. (AR 280). Dr. Hohenegger reported  
21 that plaintiff stated he was using cannabis twice weekly and drank  
22 from one or two beers a day to three or four beers a day twice  
23 weekly. (AR 281). The ALJ pointed out that Dr. Hohenegger did not  
24 consider whether plaintiff would suffer any limitations if he  
25 stopped using alcohol and marijuana. (AR 24).

26 On February 11, 2003, Thomas Rowe, Ph.D., examined Plaintiff.  
27 (AR 128-132). Plaintiff told Dr. Rowe he drank a fifth of alcohol  
28 per week. (AR 131). As the ALJ notes, Dr. Rowe diagnosed

1 plaintiff with PTSD with delayed onset, by prior diagnosis; major  
2 depressive disorder, recurrent, moderate, and alcohol abuse. (AR  
3 17). The ALJ points out that "Dr. Rowe was of the opinion that  
4 the claimant's alcohol consumption does contribute significantly  
5 to his ongoing depressive symptoms and, if there is to be any hope  
6 of his recovering from his depression it will be necessary that he  
7 discontinue his alcohol consumption that is undoubtedly  
8 contributing to his depression." (AR 17). The ALJ noted that at  
9 the hearing plaintiff testified that he drinks a few beers and  
10 smokes marijuana. (AR 23). The ALJ further observed that Dr. Rowe  
11 opined that plaintiff "suffers from PTSD with accompanying  
12 depression and is also receiving considerable secondary gain for  
13 maintenance of his symptoms and questions his motivation for  
14 treatment, recovery and return to a productive lifestyle." (AR 17-  
15 18).

16 The ALJ considered the report by state agency consultant,  
17 Gerald Gardner, Ph.D., dated March 10, 2003. (AR 163). The ALJ  
18 notes that Dr. Gardner believed that the plaintiff suffers from  
19 affective disorders, anxiety-related disorders and substance  
20 addiction disorders which are severe but do not meet the listed  
21 requirements. (AR 18). Dr. Gardner notes the mental status  
22 examination shows intact cognition to understand and remember  
23 instructions and procedures; attention and concentration are  
24 grossly intact. Affective symptoms, such as PTSD related anxiety,  
25 may distract plaintiff at times. Dr. Gardner believed that  
26 socially plaintiff's behavior is grossly appropriate in contacts  
27 with professionals. He is likely prone to some withdrawn and  
28 irritable behavior, but can carry out less demanding task-related



1 social interactions in grossly appropriate fashion. (AR 18).  
2 Tolerance for crowded public settings are likely limited. Dr.  
3 Gardner opined that plaintiff's judgment is grossly intact and he  
4 can make simple adjustments to change. (AR 18). His PTSD would  
5 contribute to some mood reactivity to frequent change and high  
6 levels of performance pressure. Dr. Gardner opined that plaintiff  
7 can make a routine commute but would be uncomfortable with  
8 frequent travel to unfamiliar settings. (AR 18).

9 Plaintiff was referred by his mental health counselor to  
10 Janice Stern, MN, ARNP, for a pharmacotherapy evaluation and  
11 treatment on January 6, 2004. (AR 233). He reported drinking one  
12 to two alcoholic drinks per day. (AR 233). Ms. Stern reports that  
13 plaintiff was cooperative and cordial, neatly groomed, and  
14 displayed no psychomotor retardation or agitation. His mood was  
15 mildly depressed and affect generally constricted. Plaintiff spoke  
16 softly and at a normal rhythm and pace. (AR 233-234). His judgment  
17 was unimpaired and Ms. Stern estimated that plaintiff is of at  
18 least average intelligence. (AR 234). Plaintiff complained of  
19 severe sleep disturbance since leaving the Army. (AR 233). He  
20 reported flashbacks and bouts of severe depression over the years.  
21 (AR 233). Ms. Stern assessed PTSD, chronic and dysthymia, and a  
22 history of major depression, recurrent. (AR 234).

23 At the December 17, 2004 administrative hearing, Thomas  
24 McKnight, Ph.D., testified as a medical expert. (AR 320-351).  
25 Dr. McKnight stated that several diagnoses had been presented,  
26 including cannabis dependence, alcohol dependence, depressive  
27 disorder, NOS, post traumatic stress disorder, severe (but noted  
28 there was no documentation that anyone observed symptoms that are

1 reasonably consistent with severe post traumatic stress disorder  
2 and it appeared to only be self-reported), and major depression  
3 disorder. (AR 322-328). Dr. McKnight indicated that the problem  
4 with the various diagnoses throughout the record was that they  
5 appeared to be based on self report and are inconsistent with the  
6 results of Dr. Hohenegger's mental status examination which showed  
7 that plaintiff appears to be functioning reasonably within the  
8 average range. (AR 325).

9 The ALJ acknowledged that plaintiff's polysubstance addiction  
10 would cause limitations meeting the criteria of three of the  
11 listed impairments. (AR 22). However, the ALJ went on to perform  
12 the required analysis to determine what limitations would remain  
13 if plaintiff stopped abusing substances. Plaintiff initially  
14 testified that he last drank alcohol in August 2004 and last  
15 smoked marijuana prior to his hospitalization in April 2002. (AR  
16 316, 318). He admitted later in the hearing that he continued to  
17 drink and to smoke marijuana. (AR 359-360).

18 Mr. Ball's opinion that plaintiff cannot work included the  
19 active use of drugs and alcohol. The ALJ agreed with Mr. Ball that  
20 when DAA is included, the plaintiff is disabled. The ALJ also  
21 agreed with Dr. Rowe that plaintiff's alcohol abuse contributes  
22 significantly to his depression. The ALJ took note of plaintiff's  
23 testimony that when working he had never missed a day. (AR 26).  
24 The ALJ found that plaintiff suffers from polysubstance abuse as  
25 indicated by Dr. Hohenegger, and noted that plaintiff self  
26 reported difficulties to Dr. Hohenegger at the same time he  
27 acknowledged drinking and smoking marijuana. (AR 20, 24). The ALJ  
28 considered and in part agreed with the opinions of Mr. Ball, Dr.

1 Hohenegger, and Dr. Rowe. She considered plaintiff's testimony.  
2 Although plaintiff asserts that the ALJ relied only on the opinion  
3 of the testifying expert, Dr. McKnight, the record does not  
4 support plaintiff's assertion.

5 As noted by the Commissioner, the ALJ determined that  
6 Plaintiff was not entirely credible. (AR 24). Plaintiff vaguely  
7 contests the ALJ's negative credibility finding, alleging it is  
8 based on "nothing more than speculation and hearsay followed with  
9 implication." (Ct. Rec. 13, p. 23). Plaintiff points to nothing  
10 in the record supporting this argument. When a claimant does not  
11 seriously challenge the ALJ's credibility determination, medical  
12 opinions based primarily on plaintiff's subjective complaints,  
13 like Mr. Ball's report (even assuming that Mr. Ball is a an  
14 acceptable medical source), are entitled to less weight.  
15 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir. 2001) (a  
16 physician's opinion may be disregarded when it is premised on the  
17 properly rejected subjective complaints of plaintiff).

18 It is the province of the ALJ to make credibility  
19 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
20 1995). However, the ALJ's findings must be supported by specific  
21 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
22 1990). Once the claimant produces medical evidence of an  
23 underlying impairment, the ALJ may not discredit the testimony as  
24 to the severity of an impairment because it is unsupported by  
25 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
26 1998) (citation omitted). Absent affirmative evidence of  
27 malingering, the ALJ's reasons for rejecting the claimant's  
28 testimony must be "clear and convincing." *Lester v. Chater*, 81  
F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General findings are

1 insufficient: rather the ALJ must identify what testimony is not  
2 credible and what evidence undermines the claimant's complaints."  
3 *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9<sup>th</sup>  
4 Cir. 1993).

5 The ALJ determined that plaintiff is less than fully  
6 credible. (AR 24). In support of this finding, the ALJ indicated  
7 that plaintiff has inconsistently reported substance abuse:

8 He reported to Dr. Rowe on February 3, 2003, that he drinks  
9 one-fifth of whiskey per week and he smokes marijuana about  
10 once a month when it is offered to him by other people. He  
11 reports in April 2003 that he has been smoking marijuana  
12 since 1967 and that "a couple of years ago" he smoked on a  
13 daily basis but over the past few years has been smoking "a  
14 couple of times per week." . . . He currently reports  
15 drinking infrequently, 2 beers over the past 2 weeks. It is  
16 noted the claimant tested positive for cannabinoids on urine  
17 panel screening. [AR 222][June 2003]. On April 16, 2004, the  
18 claimant reports alcohol consumption ranging between 2 to 3  
19 beers per day to 3 to 4 beers per day two or three times a  
20 week along with twice weekly use of cannabis. . . In a Health  
21 Promotion Screening note dated May 28, 2004, . . . [i]t is  
22 noted that he drinks alcohol four or more times a week and on  
23 a typical day he drinks 1 or 2 times."

24 (AR 25).

25 The ALJ further found that plaintiff's apparent good  
26 functioning when not abusing substances (as evidenced by his  
27 hospital records), his ability to perform carpentry work around  
28 the house, his improvement in sleep reported in March and May  
2004, his statement that he never missing a day when working, and  
the motive for financial gain all diminished plaintiff's  
credibility with respect to his claim of disabling impairments  
absent drug and alcohol abuse (AR 26-27). The ALJ correctly  
identified the testimony she found less than credible and pointed  
to the evidence which undermined plaintiff's credibility. The  
undersigned finds that the ALJ's credibility determination is  
supported by the evidence of record.

1 Plaintiff also argues that, because Dr. McKnight lacks  
2 specific credentials in the area of PTSD, the ALJ should not have  
3 relied on his testimony. (Ct. Rec. 18, pp. 5-6). The Commissioner  
4 responds that this argument was waived because at the hearing  
5 plaintiff said that he had no objection to Dr. McKnight testifying  
6 as a medical expert and did not question his qualifications. (Ct.  
7 Rec. 16, pp. 13-14). The Commissioner is correct. Without giving  
8 the ALJ an opportunity to rule on such an objection, plaintiff  
9 waived the argument.

10 The court finds that the ALJ reasonably relied upon Drs.  
11 McKnight and Rowe's opinions in making her conclusions in this  
12 case. Moreover, the Court finds that the ALJ provided specific  
13 and legitimate reasons for rejecting the findings of Mr. Ball and  
14 other VA practitioners. *See Tonapetyan, supra*. Accordingly, the  
15 ALJ did not err, as alleged by plaintiff, by partially rejecting  
16 the opinions of plaintiff's treating practitioners in favor of the  
17 evaluation completed by Dr. Rowe and the testimony of Dr. McKnight  
18 in this case.

19 **D. Further Testing**

20 Plaintiff contends that the ALJ erred by failing to order  
21 further testing, specifically, the Millon Clinical Multiaxial  
22 Inventory ("MCMI-II"). (Ct. Rec. 13 pp. 22, 25). The Commissioner  
23 responds that the ALJ's duty to further develop the record is  
24 triggered only when there is ambiguous evidence or the record is  
25 inadequate to allow for proper evaluation of the evidence, and in  
26 this case neither warranted further testing. (Ct. Rec. 16, pp. 21-  
27 22).

28 The ALJ asked Dr. McKnight if additional expert evaluation  
would be warranted. He replied that the record was fairly

1 extensive; as the Commissioner notes, the doctor gave this answer  
2 in the context of testifying that the VA records did not document  
3 significant impairment, absent the impact of drugs and alcohol.  
4 (AR 323-326); (Ct. Rec. 16, p. 22).

5 The record was adequate to permit the ALJ to properly  
6 evaluate the evidence in this case. There was no ambiguity  
7 triggering the need for additional testing. Accordingly, the ALJ  
8 did not err by refusing to order additional testing.

9 The ALJ evaluated the evidence of record, considered the  
10 hearing testimony of plaintiff and the medical experts, and  
11 concluded that, absent substance abuse, plaintiff's mental  
12 impairments caused no more than slight limitations in all areas of  
13 workplace functioning with the exception of a slight to moderate  
14 limitation in accepting instructions and responding appropriately  
15 to criticism from supervisors. (AR 27). The undersigned finds that  
16 the evidence of record supports the ALJ's determination.

#### 17 CONCLUSION

18 Having reviewed the record and the ALJ's conclusions, this  
19 Court finds that the ALJ's decision that plaintiff, if not abusing  
20 drugs or alcohol, is capable of performing his past relevant work  
21 as a forklift operator is supported by substantial evidence and  
22 free of legal error. Plaintiff is thus not disabled within the  
23 meaning of the Social Security Act. Accordingly,

#### 24 **IT IS ORDERED:**

25 1. Plaintiff's Motion for Summary Judgment (Ct. Rec.  
26 13) is **DENIED**.

27 2. Defendant's Motion for Summary Judgment (Ct. Rec.  
28 16) is **GRANTED**.

3. The District Court Executive is directed to enter

1 judgment in favor of Defendant, file this Order, provide a copy to  
2 counsel for Plaintiff and Defendant, and **CLOSE** this file.

3 **DATED** this 7<sup>th</sup> day of December, 2006.

4  
5 s/Michael W. Leavitt  
6 MICHAEL W. LEAVITT  
7 UNITED STATES MAGISTRATE JUDGE  
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